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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-407

MIRIAM WINTERS,  
*Plaintiff-Appellant,*  
*against*

ABE LAVINE, et ano.,  
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**MOTION TO DISMISS OR AFFIRM ON BEHALF  
OF APPELLEE ABE LAVINE**

LOUIS J. LEFKOWITZ  
Attorney General of the State of  
New York  
*Attorney for Appellee Abe Lavine*  
Office & P.O. Address  
Two World Trade Center  
New York, New York 10047  
Tel. (212) 488-4178

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

RALPH L. McMURRY  
Assistant Attorney General  
*of Counsel*

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**MOTION TO DISMISS OR AFFIRM ON BEHALF  
OF APPELLEE ABE LAVINE**

Appellee Abe Lavine moves pursuant to Rule 16 of the Rules of this Court for dismissal of the appeal from the judgment of the United States District Court for the Eastern District of New York, entered July 21, 1976, dismissing the complaint on grounds of *res judicata* as to one claim and abstaining as to another claim. In the alternative, appellee moves for affirmance of the judgment below.

**Opinion Below**

The opinion below is not reported and is reproduced in Appellant's Jurisdictional Statement.

### Jurisdiction

Appellant purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253.

### Statute Involved

New York Social Services Law § 365-a.

### Questions Presented

1. Whether the District Court correctly ruled that appellant's constitutional claim for reimbursement for nursing care was foreclosed by *res judicata*?

2. Whether a majority of the District Court properly abstained from deciding appellant's constitutional claim for reimbursement for practitioner services, and in the alternative whether the failure of such practitioners to be licensed under New York Law constitutes a grounds for dismissing the complaint entirely?

### Statement of the Case

Appellant Miriam Winters purports to be a follower of the beliefs and practices of the Christian Science faith, although she is not actually a member of the Church. She claims not to believe in employing the services and treatments of ordinary medical doctors and nurses in treating illness. Rather, she claims to believe that any illness can be effectively cured by religious treatments administered by certain Christian Science practitioners and nurses, whether or not licensed by the State of New York.

On four different occasions appellant incurred expenses for the services of Christian Science nurses and practitioners. Each time appellant sought reimbursement from

the New York City Department of Social Services pursuant to the New York Medicaid program.

One of the four claims was for reimbursement for Christian Science nursing services. The claim was denied by the New York City Department of Social Services in November, 1973, and the denial was affirmed by the State Department of Social Services in February, 1974, on the ground that Social Services Law § 365-a(2) did not authorize such reimbursement. The Appellate Division of the State Supreme Court affirmed the denial in October, 1975.

The other three claims involved requests for reimbursement for the services of Christian Science practitioners. In one instance, the State Department of Social Services granted reimbursement. In another instance, the State Department denied reimbursement; an appeal to the Appellate Division was pending at the time of the decision below. In a third instance, a request for reimbursement had not been answered at the time of filing the complaint.

Plaintiff contends that her First Amendment right to pursue her religious beliefs was violated in those instances in which she was denied reimbursement.

The court below found it unnecessary to reach the merits of plaintiff's First Amendment claim. The entire court found that the doctrine of *res judicata* barred the claim for nursing care reimbursement. Two members of the court found that the doctrine of abstention required the court to stay its hand as to the practitioner reimbursement claim. A third member of the court found that no First Amendment issue was raised as to reimbursement for practitioner services since the practitioners in question were not licensed to practice under New York law.

The disposition of the court below was entirely correct for the reasons set forth below.

## ARGUMENT

The District Court correctly held that appellant's nursing care claim was barred by *res judicata*. A majority of the District Court properly abstained from deciding appellant's practitioner services claim; in the alternative the complaint should be dismissed.

### Res Judicata

The entire panel found that appellant's nursing care reimbursement claim was barred by the doctrine of *res judicata*. In so concluding, the court simply applied elementary and established principles of law to a simple set of facts. It has been widely held, as this Court noted in *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973), that the doctrine of *res judicata*, based on State court determinations, may be applied in federal civil rights actions. See, also *Thistlewaite v. City of New York*, 497 F. 2d 330 (2d Cir. 1974); *American Surety Co. v. Baldwin*, 287 U.S. 156, 164-165 (1932) (Full Faith and Credit Clause requires that State court judgments be given the same *res judicata* effect in Federal court as in State court, even when federal constitutional questions are involved). Appellant cites no authority to the contrary. *Newman v. Board of Education*, 508 F. 2d 277 (2d Cir.) cert. denied, 420 U.S. 1004 (1975), cited by appellant, is totally inapposite, since there the Court of Appeals found that plaintiff had failed completely to raise her federal constitutional claims in State court.

In this case the court below found, after an examination of the briefs submitted by both parties to the Appellate Division, First Department, that the appellant's nursing reimbursement claim of unconstitutionality was "clearly and explicitly" submitted to that court in her Article 78 proceeding in State court.

Appellant does not now deny that her constitutional claim was presented to the State court. Rather, she argues that her claim was made "in the context" of a

state law claim, and implies that the claim was merely mentioned in State court. However, appellant offers no evidence to support that view.\* Further, the court below was well aware that mere mentioning of a constitutional claim in State court would be insufficient for *res judicata* purposes, citing *Newman v. Board of Education*, *supra*. The Court ruled that elaboration of the claim with supporting citations of authority would be required (A. 49), and appellant does not dispute that her claim was not elaborated in this fashion.

Appellant claims that the opinion of the Appellate Division does not mention any constitutional issue. This, of course, is irrelevant for purposes of *res judicata* analysis. *Grubb v. Public Utilities Commission*, 281 U.S. 470, 477-478 (1930). *Accord*, *Lecci v. Cahn*, 493 F. 2d 826, 830 (2d Cir. 1974); *Tang v. Appellate Division*, 487 F. 2d 138, 141, n. 2 (2d Cir. 1973) cert. den. 416 U.S. 906 (1974). As the Court below correctly noted, under State law a final judgment on the merits is conclusive as to the rights of all parties with respect to issues actually raised and litigated even if not decided by the court and has *res judicata* effect. Under the authorities discussed above such *res judicata* effect would, of course, apply in a federal civil rights action.

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\* The appellant's Appellate Division Brief, on which the Court below based its conclusion that the claim had been "clearly and explicitly" presented to the state courts, has not been included in appellant's jurisdictional statement. However, it is clear that that brief did not simply "mention" the constitutional claim as was the case in *Newman*, *supra*. Rather, one of the two main "POINTS" in the brief was entitled, "The Decision of the Department of Social Services Not to Authorize Public Assistance for the Cost of Christian Science Nursing Care is Violative of the First Amendment." The argument under this point heading discussed *Sherbert v. Verner*, 374 U.S. 393 (1963) and its alleged applicability to appellant's situation. Appellant's reply brief again discussed the First Amendment issue, citing *Sherbert v. Verner*, *supra*, and *Winters v. Miller*, 446 F. 2d 65 (2d Cir. 1971).

In this connection, it must be noted that the Appellate Division found, *inter alia*, that there was "insufficient [sic—probably should be "evidence"] in the record to indicate either the nature of her illness or of the treatment which she received." (A. 111). Apart from any alleged *constitutional* issue, it is clear that this *factual* determination is final and binding on a Federal court; appellant may not relitigate the sufficiency of her evidence in Federal court. *Siegel v. National Periodical Pub., Inc.*, 508 F. 2d 909, 913 (2d Cir. 1974); *Venitron Corp. v. Benjamin*, 440 F. 2d 105, 108 (2d Cir.), cert. den. 402 U.S. 987 (1971) in accord, *Rooker v. Fidelity Trust Co.*, *supra*.

In view of all the above circumstances, and since the parties in the Federal and State proceedings were identical, the conclusion that *res judicata* applied in the § 1983 action was inexorable.\*

A related issue in this case and not recognized by appellant is the question of primary forum choice. Having chosen to litigate federal claims in a state forum, no salutary purpose is served by ignoring the State court's disposition and relitigating the issue all over again in Federal court. *England v. Board of Medical Examiners*, 375 U.S. 411 (1964). "[W]here a constitutional issue is actually raised in the state court . . . the litigant has made his choice and may not have two bites of the cherry." *Lombard v. Board of Education of City of New York*, 502 F. 2d 631, 636-637 (2d Cir. 1974). See also *Tang v. Appellate Division*, *supra*; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). A second bite at the cherry is precisely what appellant is seeking.

\* Appellant claims that the State Court of Appeals *sua sponte* dismissed an appeal to that Court because "no substantial question is directly involved" (A. 112). According to the appendix, that decision was rendered April 29, 1976. The subsequent opinion of the court below (A. 50) suggests that that court was unaware of this. In any event, in view of the disposition of the State Court of Appeals, the authorities and reasoning of the court below remain fully applicable.

## Abstention

As to the claims for reimbursement for practitioner services, two members of the panel (HAYS, C.J. and BARTELS, D.J.), found that the court should abstain. This conclusion was entirely correct. In deciding to abstain the majority simply applied basic principles of law to an uncomplicated set of facts.

When a constitutional claim involving a state statute is at issue, it is appropriate for a Federal court to abstain when (1) the state statute involved is unclear or its interpretation uncertain; (2) the resolution of the constitutional issue must depend on the interpretation of state law, and (3) the state law must be susceptible to an interpretation which would avoid the federal constitutional issue. See *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973); *Lake Carriers Assn. v. Mac Mullan*, 406 U.S. 498 (1972); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *McRedmond v. Wilson*, 533 F. 2d 757 (2d Cir. 1976).

In this case, all three conditions were present. As the majority below noted, the State Department of Social Services had taken contradictory action on two identical claims for reimbursement of practitioner services. Thus, plainly the statute in question was unclear. As to the other two criteria, the majority below noted that the terms of the statute were broad and non-exclusive and would be susceptible to an interpretation favorable to appellant and which would save the constitutional question. The majority further noted that such an interpretation was a distinct possibility since appellant had already one favorable ruling by the State Department of Social Services. Clearly, all the prerequisites for abstention were present here.

On numerous recent occasions, conveniently ignored by appellant, this Court has ordered abstention in a wide variety of contexts where the State statute was unclear or susceptible to an interpretation that would save the constitutional issue. *Belotti v. Baird*, 44 U.S.L.W. 5221

(7/1/76); *Boehning v. Indiana Employees*, 423 U.S. 6 (1975); *Harris County Commrs. Court v. Moore*, 420 U.S. 77 (1975). The same principles are clearly applicable to the case at bar.

Appellant urges that she is in a procedural box, and that the court below has in effect told her that "both going and not going to State courts" prevents vindication of her federal rights. This claim is without merit.

Appellant appears to be deliberately confusing and mixing the nursing reimbursement claim and the practitioner reimbursement claim.\* It is important to separate these two claims. The *res judicata* portion of the Court's ruling applies only to the "nursing" constitutional claim, which was litigated in State court. The "abstention" portion of the decision applies only to the "practitioner" constitutional claim. As of the decision of the court below, no state court decision had yet been rendered on the New York Statute's applicability to Christian Science practitioners.

Thus, appellant faces no "dilemma" here, as there is no "deadly combination" of *res judicata* and abstention. The court below applied these concepts to two separate claims.

The purpose of abstention is to afford state courts a chance to interpret or clarify state law so as to avoid constitutional questions. The purpose is *not* to afford state courts a chance to pass on federal constitutional claims. Thus, the *res judicata* bar will not arise in a case in which a Federal court abstains unless the claimant chooses to

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\* See First "Question Presented," Jurisdictional Statement, p. 5; see letter of counsel to three-judge court dated August 10, 1976 (A. 126), referring to footnotes "8" and "9" of the Court's decision and suggesting that abstention is no longer appropriate. In fact, footnotes "8" and "9" were footnotes to a discussion of the nursing claim, the decision on which turned on *res judicata*, not abstention. The Court below evidently apprised counsel of his error in a "phone call" (Jurisdictional Statement, p. 9), although appellee herein was not privy to this "phone call." See also subheading entitled "Deadly Combination" (Jurisdictional Statement, p. 13).

litigate fully in State court not only his state law claims but his federal constitutional claims, as appellant did with her nursing care claim. Thus, there is no procedural box here.

Appellant says she only wants her day in court. As to the nursing claim, appellant has already had her day in court. As to the practitioners claim, she is being afforded her day in court.

Judge Dooling's concurring opinion\* on the question of reimbursement for practitioner services is a valid independent basis for dismissing the complaint entirely. Judge Dooling found that as to these practitioner claims no constitutional issue was raised since appellant's practitioners were not licensed under New York Law and the State had the right to license practitioners of medicine provided there was no blanket exclusion of therapies in which prayer or beliefs are the active agents simply because, and for no other reason, the agent is characterized as "religious." In view of the State's broad discretion in the exercise of its police power especially in the field of health, such a conclusion was entirely correct. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954).

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\* Incorrectly referred to by appellant as a "dissent." See Jurisdictional Statement, p. 17.

## CONCLUSION

**The appeal from the judgment below should be dismissed. In the alternative, the judgment below must be affirmed.**

Dated: New York, New York, November 19, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the State of  
New York  
*Attorney for Appellee Abe Lavine*

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

RALPH L. McMURRY  
Assistant Attorney General  
*of Counsel*